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ABSTRACT

As a result of the large number of employees who feel a sense of duty to report waste and corruption within their firms, 500,000 people each year are unjustly dismissed. This document reviews several positions taken by various courts and illustrates some common ground for employees who have been unjustly dismissed due to their whistleblowing. First, private employers can be held liable for unjust dismissals provided the employee can find a statute that has been violated, or if the employer performs a great deal of governmental work. First Amendment rights are not always guaranteed for nongovernmental employees, but when the public good is jeopardized, the employee stands a better chance of receiving a favorable ruling. Second, the burden of proof for an unjust dismissal lies initially with the dismissed employee. Third, when suing for damages or relief, many statutes require that such action be taken within a prescribed time period. Finally, discrimination need not lead to dismissal for employees to seek redress; however, again the burden of proof is on the employee. Dissidence in the workplace today is more acceptable than in the past; employees feel they are entitled to express themselves freely, and the courts are increasingly agreeing. (18 references) (KM)

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REVIEW OF LEGAL GUIDELINES PERTAINING TO UNJUST DISMISSALS AND WHISTLEBLOWING IN THE PUBLIC AND PRIVATE SECTORS

by

Steven O. Spurger

A position paper

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July 20, 1989

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Issue

Historically the right of an employer to terminate a public or private employee "at will" for whatever the reason has largely gone unchallenged. The U.S. Supreme Court in a 1884 ruling (2) said that employers:

> May dismiss their employees at will....for good cause, for no cause, or even for a cause morally wrong, without thereby being guilty of legal wrong.

This freedom given employers by this early Supreme Court decision went unchallenged for most of this century. It is easy to see how in a time when the early U.S. industrial economy was employing large numbers of unskilled workers at low wages, it was common for disgruntled employees to be fired, and management's prerogatives were unquestionable.

Today science and technology have created a greater need for more highly educated and skilled workers than in those earlier times. Bosses are no longer managing as autocratically as before, but rather more democratically. These changes in labor have resulted in a larger number of employees who are knowledgable of their rights and protections and who feel a sense of inner duty to report waste and corruption in their jobs. As a result, half-a-million employees each year are unjustly dismissed, according to research collected by Jack Steiber, director of the Michigan State School of Labor (3).

There are numerous federal and state laws which have been enacted to protect public sector employees from wrongful dismissals. Among the federal laws established are: the National Labor Relations Act, the 1964 Civil Rights Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, the 1974 Energy Reorganization Act, the Railroad Safety Act, the Federal Safe Drinking Water Act, the Surface Transportation Assistance Act, and many others (9). Many of these federal laws only provide protection to government employees. Several states have passed statuates protecting their own employees. One example is the "Texas Whistleblower Act", enacted in 1983 which protects state

employees (17). Twenty-one states currently have laws that protect public and private sector employees who report unlawful activities of employers (9). In 1987, Montana became the first state to enact an "at will" law that pronibited any employer, public or private, from firing an employee without showing "good cause". This marked the first time that any statutes specifically gave private employees "due process rights" similar to those guaranteed to most public employees. There are still many states however, that don't have any "whistleblowing" or unjust dismissal statutes.

Legislative and judical movement towards protecting the rights of workers unjustly dismissed has been a jerky rather than a consistent forward movement. The courts have ruled in favor of both private and public employees unjustly dismissed (1, 2, 7, 8). In other instances they have ruled against employees with very similar cases (4, 13).

This paper will attempt to review several different positions taken by various courts and find some common ground for employees who are unjustly dismissed due to whistleblowing. Not all of the legislative and judical findings specific to this topic can be reviewed in such a brief paper. I will limit my review to four subtopics: dismissal rights of private sector whistleblowers, burden of proof in unjust dismissal, timeliness of seeking relief, and discrimination of whistleblowers who are not dismissed. Some of these points are eluded to in the Texas Whistleblower Act (17). My review will discuss some precedent setting cases which influenced how the Texas law was written and will provide specific guidelines on how the courts might be expected to rule on these four specific points.

Points of View

As a result of several federal and state statutes having been enacted to aid the unjustly dismissed employee, many unjust dismissal cases have been settled outside of the courts through grievance hearings and lower level employer reviews. Because of this intraspective greiving process, many cases of wrongful

dismissal are corrected locally, and are therefore not easily referenced. The cases which have been settled in the courts tend to be those where either the employee was not covered by a specific legislative act, such as private sector employees, or in cases where public workers sought to recover damages or appeal decisions beyond what the established grievance procedures would allow. Despite the small number of cases I could find to examine, several important points emerge.

Dismissal rights of private sector whistleblowers - In a Houston case in 1972, McIntire v. Dupont and Co. (13), a district court judge in Harris County refused to hear the case brought by a Dupont Co. senior research engineer, that he was unjustly terminated for exercising his First Amendment rights. The court ruled that the engineer was employed "at will" by Dupont and could be dismissed for any reason.

A 1974 case decided by the Pennsylvania Supreme Court, Geary v. U.S. Steel (4), was similar in its outcome, but this case involved a much clearer example of an employee speaking out in order to protect the public. Geary, was a degreed engineer with fourteen years of reported excellent service. He had received several promotions and at the time of the case was a mid-level salesman, his opinions well respected by the upper-management. He was personally involved in a decision by U.S. Steel to begin production on some oil well casing pipe. The pipe that was initially produced, when tested was shown to have a very low safety factor, but the upper-management decided to push ahead with planned production despite the objections of Geary and their own engineers. When Geary continued to pressure management to redesign the pipe rather than begin producing the blow-out prone pipe he was fired. The court ruled in the case that the common law rule of employment "at will" could not be questioned. It's interesting to note that this case was lost by a narrow one vote margin.

The first overturning of the employment "at will" law occured in Harless v. First Fairmont National Bank (7). In this 1978

case a bank vice-president was discharged when he refused to go along with illegal overcharges to customers as ordered. After being harrassed by his superiors, even after his dismissal, he brought charges against the bank. The Supreme Court of West Virginia ruled that:

> When an employee is discharged and the motivation centers around a "public policy principle" then the employer may be held liable for damages.

Clearly the courts have decided that in cases where the public good is concerned even private companies man not act indiscriminately when terminating employees (1, 2, 12, 15).

A very different case decided in 1975 also involved protections for private "at will" employees. In Holdonak v. Avco (8), a private employee sued for damages when his free speech rights were denied. Previously only public employees had been guaranteed free speech rights (10, 16). The court ruled in Holdonak that since eighty percent of Avco's business dealings were produced under U.S. military contract, the umbrella of the First Amendment must apply.

Clearly these cases show that private employers can be held liable for unjust dismissals, even though this point has not indisputably been established by the courts. Private employees stand a good chance of recovering damages if they can find a statute that has been violated or if their employer performs a great deal of work for the government. First Amendment rights are not always guaranteed for private employees, but in cases where the "public good" is in jeopardy the employee stands a better chance of receiving a favorable ruling.

Burden of proof in unjust dismissal - The Texas Whistleblower Act (17) holds that an employee who sues for injunctive relief or damages, is responsible for proving that the employee was suspended or otherwise discriminated against for reporting a violation of law. This "burden of proof" clause is a result of a 1977 case decided by the U.S. Supreme Court, Mt. Health City

School District v. Doyle (14). A public school teacher, Doyle, was discharged following his speaking to a local radio station regarding his district's new teacher dress code policy. The school board didn't deny that this was one of their reasons for dismissing the teacher, but they also presented a long list of other reasons why the employee was being discharged. The Supreme Court ruled that initally the "burden of proof" is upon the employee to prove that the conduct was constututionally or otherwise protected and that it was known about by the employer. Once proven the burden shifts to the employer to show that he would have reached the same decision in the abscense of the protected conduct. In this case the district showed sufficient reason to discharge the teacher without relying on the radio incident. This "burden of proof" test has been applied to all subsequent unjust dismissal cases (10, 18).

Timeliness of seeking relief - It is clear that when sueing for damages or relief many statutes require that this be done within a prescribed period. The Texas Whistleblower Act only allows suits brought before the 90th day after the alleged violation occures. In a 1979 Florida case, Greenwald v. City of North Miami Beach (6), it was clearly shown by Greenwald, that he had been unjustly dismissed after reporting a violation of the Safe Drinking Water Act. Unfortunately, Greenwald spent too much time seeking justice from the local Civil Service Board and didn't appeal the decision to the U.S. Department of Labor untill one-hundred and fifteen days after his dismissal rather than within the thirty day limit specified by the act. An administrative law judge who heard the case sided with the young chemist, but couldn't ignore the lapse in procedure. The case against the city was dismissed. Clearly the courts stringently adhere to the time limits that are specified.

Discrimination of whistleblowers who are not dismissed - Discrimination need not lead to dismissal for employees to seek redress. In a Texas case where a teacher was reassigned as a way of retal-

iation, the court held (10) that as long as a reassignment is the result of a constitutionally protected right being violated, the reassignment could be viewed as a demotion and was not permissable. Low marks on a promotion evaluation are discriminatory when it is done following the employee's engaging in a constitutionally protected activity (11). Employees are permitted to regain damages in an amount sufficient to reinstate the employee to the same position as before the discrimination occured even if no dismissal took place (2). However, it must be shown by the employee that some property loss did occur.

Personal Positions

With an increased shift in managment to "Japanese Style" openness, discidence today in the workplace is much more acceptable than in the past, and is often viewed as a sign of loyalty. Employees feel they are entitled to express themselves freely and the courts are increasingly agreeing. It would be benefical to both employees and employers if the smorgasbord of dozens of differing laws could be combined into one that protected well-intentioned whistleblowers.

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